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In The

Supreme Court of the United States

October Term, 1980

JOHN TARPEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was there probable cause to detain and arrest petitioner?

2. Did Agent Colgan's initial entry into petitioner's car violate petitioner's Fourth Amendment rights?

3. Should the documents seized from petitioner's car have been suppressed?

PARTIES

The parties in the district court were as follows:

United States of America

vs.

John Tarpey, John Cerverizzo, Robert Peppaceno, Edward Karnefsky and Malben Buchwald.

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No.

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October Term, 1980

JOHN TARPEY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner John Tarpey respectfully prays that a writ of certiorari issue to review the judgment entered in this proceeding on August 20, 1980, by the United States Court of Appeals for the Second Circuit. A petition for rehearing was denied February 25, 1981.

OPINION BELOW

The opinion by the Second Circuit is reprinted in the appendix hereto.

JURISDICTION

The Second Circuit on August 20, 1980, affirmed a judgment of conviction entered on February 22, 1980 in the Eastern District of New York. The petitioner had been convicted, after a jury trial, of possession of property stolen from an interstate shipment and conspiracy to do so in violation of 18 U.S.C. §§371, 659 and 2. A petition for rehearing was denied on February 25, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. The Proceedings Below

On July 11, 1979, the petitioner was indicted on two counts for possession of approximately 399 cartons of merchandise stolen from an interstate shipment and conspiracy to receive and possess same in violation of 18 U.S.C. §§371, 659 and 2. Pre-trial suppression hearings were held in November 1979. The District Court denied petitioner's motion to suppress evidence seized from his automobile. A six day jury trial took place in November and December 1979. Petitioner was found guilty as charged. On February 22, 1980, petitioner was sentenced to five years imprisonment and a $10,000 fine. The judgment of conviction was affirmed by the Second Circuit on the appeal. A petition for rehearing was denied.

II. The Evidence at Trial

A. Background

On or about May 13, 1978, an interstate shipment of

various merchandise,[1] consisting of 946 crates and cartons, consigned to Maas Brothers Department Store (hereinafter "Maas Brothers") in Tampa, Florida, was stolen in Secaucus, New Jersey (T104).[2] The merchandise was being transported as a "consolidated" shipment by Q.T. Consolidated Inc. (hereinafter "Consolidated").[3] On May 16, 1978, Consolidated's truck, sans cartons, was found abandoned.

B. May 17, 1978

By 8:00 a.m., FBI agents had tracked down a portion of the stolen Maas Brothers' shipment to a truck yard located on Alabama Avenue, Brooklyn. Agents John J. Kuhn, Richard P. Mika and others observed two trailers "back to back" in the yard containing cartons with the name "Maas Brothers" on them (T110, 112, 114, 115; H10, 15, 17). Also observed were co-defendants John Cerverizzo, Robert Peppaceno and Edward Karnefsky (hereinafter "Karnefsky") loading the Maas Brothers' cartons into a yellow truck and a green van (T112-114; H7, 16).

Karnefsky, a heavy set 300 pound man wearing a plaid shirt, left the yard with the loaded green van and drove to Tenth Avenue, Brooklyn, to a house where a woman named Delores Morrow lived. The cartons were transferred into a garage (T122-124; H17).

Peppaceno and Cerverizzo left the yard at Alabama Avenue in the loaded yellow truck and drove to Tina's Stationery Store

1. Ladies' dresses, cosmetics, glassware, bathroom scales and other items.

2. "T" references are to the trial transcript; "H" references are to the pre-trial suppression hearing.

3. When goods are shipped via a "consolidated" shipment, various vendors deliver the merchandise to the carrier, who delivers them to the consignee.

on Eighth Avenue, Brooklyn, where approximately 60 of the stolen cartons were deposited. Tina's Stationery Store is owned by co-defendant Malben Buchwald. Peppaceno and Cerverizzo were arrested at Tina's (T305).

Karnefsky, meanwhile, drove back to the truck yard at Alabama Avenue to load up again. After loading, Karnefsky, in his green van, drove down Pennsylvania Avenue followed by Agents Kuhn and Mika, each in his own car.[4]

C. Enter Tarpey

As Agent Kuhn was following Karnefsky he noticed Tarpey, in a grey Ford LTD, weaving through the traffic. The traffic signal at Pennsylvania Avenue and Linden Boulevard turned red and Karnefsky, in the left lane of the southbound flow of traffic, stopped. Tarpey, in the right-hand lane, two or three car lengths from the light, also stopped. Tarpey left his vehicle and walked over to Karnefsky in the green van. Tarpey talked to Karnefsky for about 15 seconds, pointed southward, and then walked back to his car. Tarpey's conversation was not overheard (T408).

When the traffic light turned green, Karnefsky fell in behind Tarpey and they proceeded in tandem to 57th Street, Brooklyn. This was in the direction of Rapid Vending Corp., Tarpey's employer (T724).

[Carl Koren testified that he is the owner of Rapid Vending Corp., operators of candy and cigarette vending machines placed in various locations throughout the city, including the United States Coast Guard Station at Governors Island, New York. Tarpey is employed by Rapid Vending Corp. as its general

4. The time now was approximately 4:00 p.m.

manager and his duties include servicing and collecting the money from certain designated machines (T720, 725). Koren testified that on May 17, Tarpey had serviced eleven machines at the Coast Guard Station and had collected $1,200 in nickels, dimes and quarters, which were placed in money bags — each one representing a particular machine (T727-728, 730).

Koren testified further that Karnefsky owned "Quick-As-A-Wink Car Service" in Brooklyn and was a customer of Rapid Vending, in that one or more machines were located in Karnefsky's place of business. Koren stated that Karnefsky owed money to Rapid Vending Corp. and that "if we ran into him we'd like to talk to him" (T726-727).]

D. 57th Street, 4:15 P.M.

Tarpey made a left-hand turn from Flatlands Avenue on to 57th Street, followed by Karnefsky in the green van. Tarpey pulled up along the curb, parked his car legally, emerged from the car and was walking on the sidewalk towards a friend's building (T433; H53). Karnefsky double-parked the green van slightly behind Tarpey's car. No words were spoken between the two men (T411). It was 4:15 p.m. and the trailing agents moved in.

Agent Mika pulled his car in front of Tarpey's vehicle, Agent Kuhn pulled in behind Karnefsky's van, blocking them from moving (T411). Mika stopped Tarpey as he was walking on the sidewalk away from the van (T411). Kuhn approached Karnefsky.

Agent Mika asked Tarpey to identify himself, which Tarpey did. Mika advised Tarpey that he was being "detained" to determine whether there was stolen property in Karnefsky's van.

Mika advised Tarpey of his constitutional rights (H30). Mika asked Tarpey "what his relationship was [to Karnefsky]" (H31). Tarpey replied that he knew Karnefsky, who was following him to Rapid Vending Corp. (H31).

Although Mika told Tarpey that he was being detained "to determine whether there was stolen property in Karnefsky's van," Mika had personally observed Karnefsky depart the truck yard on Alabama Avenue in the green van prior to the trip on Pennsylvania Avenue and recognized the 300 pound Karnefsky as an obvious person and easy to spot (T402-403). Actually Mika, at approximately 11:45 a.m. was on surveillance at the truck yard and saw Karnefsky taking stolen cartons off the trailers and loading them on the green van (T406). He even saw names on the cartons (T406).

Mika testified that Tarpey's "detention" at 4:15 p.m. was not an arrest. He stated that the agents used the next *three hours* to determine whether the property on Karnefsky's van was stolen before deciding at 7:15 p.m. to formally advise Tarpey he was under arrest (T418; H41-42). Agent Kuhn testified, however, that after Tarpey had been "detained" he was not free to leave (H155) and that it did not take three hours to determine that the merchandise was stolen (T488-489). *Agent Kuhn testified, that the several hours were spent trying to figure out what, if anything, Tarpey would be charged with* (T508; H131).

E. 57th Street, 4:15 P.M. to 7:15 P.M.

After Tarpey and Karnefsky had been detained, Agent Kuhn spent the better part of the next three hours on the telephone in a booth across the street from Agent Mika and their detainees (H88).

Mika testified that for the next three hours Tarpey was either standing in the area, sitting in Mika's car or sitting in his own car (T393, 434-435). Tarpey was in Mika's car from 4:15 p.m. to 5:30 p.m. During this period, Tarpey had the keys to his vehicle on his person (T432). At approximately 5:30 p.m., Tarpey voluntarily opened the trunk of his car to allow an inspection by Mika (T430). No contraband was found and Mika testified that he had no reason to believe there was any contraband in the car (T438).

After opening the trunk, Tarpey was allowed to sit in his own vehicle and, according to Mika, the keys thereto were taken by him from Tarpey so that Tarpey would not escape (T434).

Notwithstanding Mika's concession that it is an FBI cardinal rule and normal procedure to look into a car where a detainee or arrestee is in his car (to be certain there are no secreted weapons or spare sets of keys), he testified that he did not look into Tarpey's car (T434-435).

F. Enter FBI Agent Patrick Colgan

Mika testified that Kuhn had called Patrick Colgan, an FBI agent experienced in "hijack type cases," to the scene for assistance (H59-60). Colgan knew Tarpey in 1972 when he participated in an arrest of Tarpey (H140-141). Mika testified that Colgan arrived at 6:50 p.m. just before the decision to arrest Tarpey was made (T421; H63). Colgan testified that he arrived between 5:30 p.m. and 5:45 p.m. (T540; H140). Colgan "arrested" Tarpey at 7:15 p.m. (H92, 116).

Tarpey was told that he was being taken to FBI Headquarters in Manhattan (H70).[5] Mika testified that Tarpey

5. At FBI Headquarters, Tarpey was searched and a personal telephone directory was seized (T397; H36).

expressed concern for his vehicle because there were important keys in the trunk (T395-396; H70). According to Mika, Tarpey said he would park his vehicle in his friend's parking lot on the block (T396; H35). Mika testified that he told Tarpey that he was under arrest and could not drive his car, but that he, Mika, would move the car; that Tarpey said "OK" (T396; H35) and turned over his car keys to Mika (T436),[6] who gave them to Colgan (H35).

Mika later conceded however, that Tarpey *never asked him or any agent* to move his car (T425; H70). Kuhn, however, in an affidavit submitted to the United States Magistrate in support of a search warrant of Tarpey's vehicle, stated:

> "Following Mr. Tarpey's arrest, he gave the keys to [his vehicle] to a Special Agent and *asked the agent to move the car to a nearby lot*" (A61a).[7] (Emphasis added.)

Colgan testified that when he arrived on the scene he spoke to Tarpey, who was seated in his car (H141). Colgan then contacted his supervisor from the telephone booth across the street and requested "an opinion as to the arrest of Karnefsky and Tarpey" from the U.S. Attorney's Office (H141-143). Authorization for the arrests was given.

Colgan stated that Tarpey and Mika were discussing securing Tarpey's car (H141). Colgan testified (H144):

> "I entered the conversation by asking Mr. Tarpey if it would be possible to contact a person in the

6. Mika, however, testified that *after* 5:30 p.m. he *had* Tarpey's keys (T434).

7. Reference is to Tarpey's Appendix on Appeal.

> nearby building on East 57th Street, *a person that had contacted Mr. Tarpey* during the time that I was there on East 57th Street and to see if this person would perhaps be willing to secure this car for [Tarpey] . . . since he was to go to the New York office for processing" (H144-145). (Emphasis added.)

According to Colgan, Tarpey said a person named Ralphy might be able to take care of the car. Tarpey and Colgan walked into the nearby building and a conversation with Ralphy ensued (T543-544). Colgan heard Tarpey tell Ralphy that the agents would shortly "turn over the *car and the keys*" and ask Ralphy if he would secure the car for the night, to which Ralphy said he would (H145). (Emphasis added.) Colgan stated that he and Tarpey left the building and Colgan received Tarpey's car keys from Mika (H145).

Tarpey testified at the suppression hearing that Colgan had asked him about securing his vehicle. Tarpey then spoke to Ralphy. However, an individual named Lennie Insalaco, who was in the same business as Tarpey and worked out of the same office, was also at East 57th Street and Tarpey arranged for Insalaco to take the car back to the office since there was money from vending machine collections in the trunk (H192-193). Tarpey attempted to give Insalaco the car keys but Colgan took them, telling Insalaco to go into the nearby building (H193). Tarpey testified that he did not give consent to any agents either to enter or move his car (H190).

Insalaco testified that he was in the vending machine business and works out of the same office as Tarpey, although not associated with him (H167-168). Insalaco's uncle owns the building on East 57th Street and is a friend of Ralphy, who operates a business therein (H169). He testified further that

Tarpey wanted him to have the keys to his car and as Tarpey was handing them over, an agent took them away (H171). Tarpey wanted Insalaco to take the car to their joint office (H172).

Insalaco stated that the agent told him to wait and would give him "*the car and the keys*" after obtaining a release (H172). (Emphasis added.) Insalaco waited, but saw the car driven away (H173).

G. Events Subsequent to the Arrest

Tarpey and Karnefsky were driven away from East 57th Street by Mika, alone, in his Bureau car.[8] Kuhn drove Karnefsky's green van. Colgan remained on East 57th Street with Tarpey's keys and car (T445).

Colgan then entered Tarpey's vehicle. He testified at the suppression hearing (H147):

> "[A]s I pulled out of the parking spot, I applied the brakes, papers slipped out from the front passenger seat and I looked down from [sic] the papers and on top was a [Maas Brothers invoice] . . . I was pulling out of the parking spot. There was a vehicle in front of me[9] and I just applied the brakes because there was a vehicle at this time coming by me."

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8. It was Colgan's decision that a single agent drive both arrestees (T559), notwithstanding the prudent FBI policy against one agent and two suspects in one car (T443).

9. When Mika left with his arrestees in his car there was no vehicle any longer in front of Tarpey's car (T438).

Colgan stated further that prior to the papers sliding "out from under the right front passenger seat of Mr. Tarpey's car" he had not been aware of their presence (H148). Colgan then drove Tarpey's vehicle to a telephone booth and requested a tow truck to remove the car to a government facility (H149).

H. May 18, 1978

At approximately 6:00 p.m.[10] Tarpey was brought before the Magistrate to fix bail and was released. Also at 6:00 p.m. Agent Kuhn swore to the truth of his affidavit in support of search warrants for, among other things, authorization to search Tarpey's car (T499-500; H122-123). That day Colgan had told Kuhn of his activities relating to Tarpey's car the night before (H149). Colgan did not tell Kuhn that "*when he entered* [*Tarpey's*] *vehicle* [*he*] *observed numerous papers in the car, among them in plain view on the seat was* [*a Maas Brothers*] *bill of lading . . .*" (H150). (Emphasis added.) That was not true (H151).

Agent Kuhn's affidavit in support of the warrant stated (paragraph 22):

> "When the agent entered the vehicle, he observed numerous papers in the car. *Among them in plain view on the seat was a* [*Maas Brothers*] *bill of lading . . .*" (A61a). (Emphasis added.)

The warrant was issued.

Kuhn was examined about the statement in his affidavit that "among [the papers] in plain view on the seat was a bill of lading with the name Maas Brothers on it":

10. Twenty-five hours and forty-five minutes after he was "detained" on 57th Street.

"Q. Was that true? A. No.

Q. You knew that was false when you swore to it before the Judge, isn't that a fact? A. I knew that was not true when I swore to the affidavit." (T501).[11]

I. May 19, 1978

Agents Kuhn and Colgan, armed with the search warrant, searched Tarpey's car (T474-475, 555). Agent Kuhn said they seized 265 shipping documents, *i.e., invoices* and packing slips found under the driver's seat and under the passenger seat (T478). It was not contested by petitioner Tarpey that the documents related to the stolen Maas Brothers shipment. The documents were admitted against Tarpey at trial. Tarpey's counsel argued to the jury that the evidence demonstrates that those documents could not have been in the car. The jury, however, convicted Tarpey.

REASONS FOR GRANTING THE WRIT

Petitioner maintains that at each of the three critical stages leading up to the "discovery" of the 265 shipping documents, his constitutional rights were violated. It will be demonstrated below that the agents had no probable cause to arrest Tarpey at 4:15 p.m. or at 7:15 p.m. on May 17, 1978. It will also be shown that Agent Colgan's entry into Tarpey's vehicle was unauthorized and illegal. Finally, the documents allegedly seized from Tarpey's car pursuant to the search warrant, should have

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11. At the hearing Kuhn testified that he participated in the drafting of his affidavit, read paragraph 22 of that affidavit and knew it was not true (H121-122).

been suppressed on the grounds that the underlying affidavit, which secured the warrant, was sworn to by the agent knowing that the most material statement contained therein was false.

I.

There was no probable cause to arrest petitioner.

In *Dunaway v. New York*, 442 U.S. 200, ___ S. Ct. ___, 60 L. Ed. 2d 824 (1979), the United States Supreme Court issued its most recent pronouncement regarding the necessity for authorities having probable cause prior to arresting or detaining individuals. Mr. Justice Brennan, writing for the Court, stated:

> "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion,' or even 'strong reason to suspect' was not adequate to support a warrant for arrest. See *Henry v. United States*, 361 U.S. 98, 100, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949)."

The Court held in no uncertain terms that the treatment of a citizen, whether or not it is technically characterized as an arrest or as a detention "must be supported by probable cause." 60 L. Ed. 2d at 837. Indeed, while the Court held that a police officer may *briefly* stop a citizen and inquire about his status and may even ask him to explain suspicious circumstances, any further detention or search must be based on consent or probable cause. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974).

In *Dunaway*, the defendant (1) was detained by law enforcement authorities, (2) was not told he was free to go, (3) would have been restrained had he attempted to leave, and (4) made certain statements which were later utilized against him at the trial.

The State of New York, notwithstanding its concession that the police lacked probable cause to arrest Dunaway, maintained, nevertheless, that the seizure of Dunaway did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a "reasonable suspicion" that the petitioner possessed intimate knowledge about a serious and unsolved crime.

The Supreme Court disagreed, holding that the standard of probable cause represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment.

In *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969), the High Court warned:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizure would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusion upon the personal security of our citizens whether these intrusions be termed 'arrests' or 'investigatory detentions'." 394 U.S. at 726-727.

In *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975), the Supreme Court again reiterated that arrests made for "investigatory seizures" are disapproved when made on less than probable cause, stating:

> "The impropriety of the arrest was obvious; awareness of the facts were virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their actions was 'for investigation' or for 'questioning' . . . The arrest, both in design and in execution was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up." *Ibid.* at 422 U.S. 605.

The Court in *Dunaway* recognized:

> "These passages from *Davis* and *Brown* reflect the conclusion that detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 60 L. Ed. 2d at 838.

The court below found that from the

> "sequence of events and the presence of the stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that Tarpey was directing the delivery of the cartons or was

> otherwise connected with their distribution. Thus, probable cause existed for his arrest."[12]

Even accepting every favorable inference in favor of the Government we respectfully submit that the "sequence of events" does not reasonably lead to the conclusion found by the court below. Does a citizen create probable cause for an arrest when he encounters an acquaintance who may be carrying stolen goods? If Tarpey had not been "weaving" in traffic, but "sedately" arrived at the traffic light the same time as Karnefsky, would he still be creating probable cause against himself? Should we all refrain from following an acquaintance in a vehicle lest we rouse the suspicions of undercover agents trailing behind? Cannot two acquaintances travel in tandem together to a designated location without being arrested?

Tarpey did not have contraband in his car when he was "detained," Karnefsky did. Tarpey did not deny knowing Karnefsky and travelling together with him. It was Karnefsky who denied knowing Tarpey. Why draw negative inferences against Tarpey?

At the most, the agents were suspicious. But what *facts* linked Tarpey to the crimes charged — facts which were "sufficient to warrant a prudent man in believing [Tarpey] had committed an offense?" *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States ex rel. LaBelle v. La Vallee*, 517 F. 2d 750, 753 (2d Cir. 1975). We respectfully submit there were no such facts available to the agents at the moment of arrest — whether it be 4:15 p.m. or 7:15 p.m.

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12. The court below was in error in finding that at the end of their journey to 57th Street "both men [Karnefsky and Tarpey] left their vehicles." The record demonstrates (T433; H53) that Tarpey had parked his vehicle at the curb, emerged from the vehicle and was walking away from Karnefsky when detained. Karnefsky remained in his double-parked van.

We respectfully submit that the court below overlooked the dictates and teachings of *Dunaway*, *Davis* and *Brown*, *supra*, in validating the detention-arrest here.

The most significant testimony in this record on what was really in the minds of the agents during the three hours on 57th Street is that of Agent Kuhn, who testified that *the several hours were spent trying to figure out what, if anything, Tarpey would be charged with* (T508; H131). The opinion of the court below makes no reference to this critical evidence.

II.

The agent's entry into petitioner's vehicle was unauthorized and illegal.

We concede that Tarpey was concerned about the security of his vehicle since it contained approximately $1,200 in coins which he had obtained by servicing vending machines earlier that day. The Government argued in the District Court that Tarpey consented to the agent's entry into the car to move it to a nearby parking lot for the night. Neither the District Court nor the court below found that Tarpey had consented. The court below, however, found that Colgan's purpose in entering Tarpey's car "was to secure the car, not to search it" thus making the entry non-violative of Tarpey's Fourth Amendment rights.

The Court cited *United States ex rel. LaBelle v. La Valle*, 517 F. 2d 750, 755 (2d Cir. 1975) in support of its holding that Colgan's initial intrusion into Tarpey's car was lawful. We agree with the holding in *LaBelle* that:

> "It is equally clear that incriminating evidence inadvertently coming into plain view *pursuant to*

> *an initial lawful* intrusion is subject to seizure." (Emphasis added.)

However, we respectfully take issue with the Circuit Court's finding that Colgan's initial intrusion was lawful because Colgan's purpose was to "secure" the car and not to search it. Facts justifying the intrusion in *LaBelle* are not present in this case.

In *LaBelle*, the car, with bald tires, came to a stop on a steep incline on an icy road in the center of a traffic lane. The police checking to see that the brake was on was, indeed, a "simple and necessary safety precaution." (517 F. 2d at 755). Here, there is not even a suggestion that Tarpey's car posed any hazard whatsoever. The agent's sole justification to invoke "securing" the car under the "community caretaking function" was the presence of money and keys in Tarpey's trunk. Yet, the Circuit Court completely overlooked the Government's concessions, the record and the controlling law on this critical issue.

The Government acknowledges[12a] that following Tarpey's arrest he "sought permission to move the car" into his friend's lot (Government Brief, p. 26). Agent Mika testified at the suppression hearing and at trial that Tarpey never asked any agent to move his car (T425; H70). The Government in its brief (p. 27), concedes that:

> "Tarpey and Colgan then walked into the building and spoke with Ralphy. Tarpey asked Ralphy to *secure* the car for the night and

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12a. At the Second Circuit.

explained that *the agents would turn over the car and the keys* in the near future." (Emphasis added.)

It is important to note that at this point Tarpey's friend Ralphy was to "secure" the car and would be given the car *and* the keys for that purpose. Significantly, Ralphy was not to get the keys alone — after Colgan supposedly moved the car — but he was to get the car *and* keys for the purpose of securing the car.

In *Cady v. Dombrowski*, 413 U.S. 433, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973), the defendant, a Chicago policeman, had a one car accident while driving his vehicle. The police towed the car to a garage seven miles from a police station, where it was left unguarded outside. The defendant was arrested for drunken driving. The next day a police officer looking for the defendant's service revolver made a warrantless search of the car and found several items in the trunk which were later introduced at the defendant's trial for murder, in which he was convicted. The United States Supreme Court held that the search of the car was not unreasonable since the police had exercised a form of custody of the car *which constituted a hazard on the highway, and the disposition of which was precluded by the occupant's intoxicated and later comatose condition.* The Court held that the search for the revolver was standard police procedure to protect the public from a weapon possibly falling into improper hands. The Court specifically noted that due to the defendant's intoxicated condition he "*could not make arrangements to have the vehicle towed and stored*" 413 U.S. at 443 (emphasis added). The vehicle, which had been in an accident, was incapacitated.

Similarly, Mr. Justice Powell concurring in the majority opinion in *South Dakota v. Opperman*, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976), refers to the fact that in

Opperman the owner of a vehicle illegally parked and subject to impoundment "*was not present to make other arrangements for the safekeeping of his belongings.*" 49 L. Ed. 2d at 1009. (Emphasis added.)

In addition, various state appellate courts have had the opportunity to pass upon the "community caretaking function" of law enforcement authorities. In *State v. Slockbower*, 397 A. 2d 1050 (1979), the New Jersey Supreme Court stated:

> "It has been persuasively stated in a number of cases, in seeking a rationale that would duly balance the right of privacy against legitimate police safekeeping functions, that if the circumstances that bring a vehicle properly to the attention of the police are such that *a driver even though arrested is able to make his own arrangements for its custody* or if the vehicle can be conveniently parked and locked without constituting an obstruction of traffic or other public danger, *the police should permit that action to be taken* rather than impound it against the will of the driver and thereafter search it routinely." 397 A. 2d at 1053-4. (Emphasis added.)

Judge Schreiber, in concurring, stated that there are four situations which would justify an entry into a vehicle once its owner or operator is arrested. He stated that:

> "Only when the vehicle, if not removed, poses a danger to other persons, property or the public safety does there exist a 'substantial police need' justifying impounding *if the driver is unable to arrange for a third party to provide for the*

vehicle's removal." 397 A. 2d at 75, 1057. (Emphasis added.)

In *State of Kansas v. Urban*, 595 P. 2d 352 (1979), the court found that the initial intrusion into a vehicle which afforded the authorities "plain view" of incriminating evidence was not lawful. The court held that in order for the plain view exception to the warrant requirement to apply it must be shown that initial intrusion which afforded authorities the plain view, was lawful. In *Urban*, the defendant's vehicle was impounded for safekeeping subsequent to a legal arrest. The state contended that there was a need for police custodial care in order to protect the property of the defendant. The Court recognized, among other factors, that a car should not be intruded into by the authorities when the driver or owner has the capacity to decide which steps should be taken to deal with his property. The Court noted that the defendant had a friend who was in a position to protect the vehicle.

It is respectfully submitted that the court below misapplied the holding in *La Belle, supra*, and overlooked the holdings in the community caretaking cases which have been cited above. Since Tarpey had made adequate arrangements for the security of his vehicle and its contents with two individuals, Agent Colgan's initial intrusion into the vehicle was unlawful and constituted a violation of Tarpey's Fourth Amendment rights.

III.

The affidavit in support of the search warrant for Tarpey's car, having knowing, material false statements contained therein, is invalid and a nullity as a matter of law and mandates the suppression of any documents seized pursuant thereto.

It is clear from the record that the following day after Tarpey's arrest (May 18) Agent Colgan told Agent Kuhn of his activities relating to Tarpey's car the previous night (H149). Agent Colgan *did not* tell Agent Kuhn that "when he entered Tarpey's vehicle, he observed numerous papers in the car, among them in plain view on the seat was [a Maas Brothers] bill of lading" (H150). Nevertheless, Agent Kuhn sought a warrant to search Tarpey's car after having participated in the drafting of his affidavit and after having read it. The affidavit stated in pertinent part (par. 22):

> "When the agent entered the vehicle, he observed numerous papers in the car. Among them in plain view on the seat was a [Maas Brothers] bill of lading." (A61a).

Agent Kuhn, both at the hearing and at the trial, acknowledged that this statement was not true and that he was aware of its falsity prior to swearing to the truth thereof before the United States Magistrate (H122-123; T501).

In *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the United States Supreme Court held that if after a suppression hearing, a defendant established by a preponderance of the evidence that a false statement was included in an affidavit to secure a warrant knowingly and intentionally or with reckless disregard of the truth and the false

statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit.

Here, Agent Kuhn's admittedly false representations were the only basis upon which a reasonable judicial officer would even consider the existence of probable cause to issue a search warrant for Tarpey's car. Clearly, a redaction of Agent Kuhn's false statements would leave the affidavit totally devoid of any probable cause for the issuance of a search warrant for Tarpey's vehicle.

It is clear that Kuhn knew the purpose of his affidavit (T501; H120-121) and, we submit, realized that the representations as set forth in his affidavit would more easily pass judicial muster, without inquiry, than a story about an agent hitting the vehicle's brakes at no more than two to three miles an hour and having a pile of incriminating documents conveniently float from under a passenger's front seat. The documents which allegedly were found in Tarpey's car, pursuant to the warrant, were of the most incriminating nature and without their admission in evidence. Tarpey most surely would not have been convicted.

Since *Franks* was decided, several courts of appeal have embraced its holding and teachings. *See, United States v. Young Buffalo,* 591 F. 2d 506 (9th Cir. 1979); *United States v. Goldberg,* 582 F. 2d 483 (9th Cir. 1978); *United States v. Cruz,* 594 F. 2d 268 (1st Cir. 1979); *United States v. Melvin,* 596 F. 2d 492 (1st Cir. 1979); *United States v. Broward,* 594 F. 2d 345, 351 (2d Cir. 1979) ("Such an egregious practice defeats the whole point of the procedure, having a judicial officer make an independent assessment of whether probable cause exists.")

There are three false statements included in the above quoted two sentences of Kuhn's affidavit. Out of the twenty-eight quoted words, fifteen of them are untrue. More significant, however, than numbers, is the totally false picture painted by the sworn representations.

The untrue statements and words are:

> "When the agent entered the vehicle, he observed . . . on the seat . . . a bill of lading. . . ."[13]

The "error", as the court below kindly called it, "was the statement that invoices were seen *on the seat* of the car *upon Agent Colgan's entering the car,* whereas in fact they were seen *on the floor* of the car when they slid into view upon *Agent Colgan's sudden application* of the brakes to avoid traffic." (Emphasis added.)

Our contentions here are of substance and not semantics. The three false "*statements*" portray the *event differently than the alleged truth.*

We submit that the false statements[14] were made knowingly and intentionally or, at the very least, with reckless disregard of the truth and that the false statements were necessary to the finding of probable cause.[15] The statements are material to *what* was found, *when* it was found and *where* it was found. As to

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13. No bills of lading were found.

14. Kuhn: "I knew that was not true when I swore to the affidavit." (T501, *see also,* H121-122).

15. *Franks v. Delaware, supra.*

each, the statements were false and made knowingly and intentionally. The overall thrust of the two sentences containing the statements clearly convey a picture which would arouse little inquiry by a prudent Magistrate. The "true" version, on the other hand, we submit, should cause the Magistrate pause to consider the fortunate circumstance of hitting the brakes and watching the evidence slide out from under the seat.

We respectfully submit that the record is in conflict with the Circuit Court's conclusion that there was an immaterial "error" which the agent didn't "catch". We submit that the record is clear that the agent knew the true facts, knew what he was doing, knew the significance of his representations and sought to fraudulently avoid judicial scrutiny of the details of "what", "where" and "when".

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted and the judgment below reviewed.

Respectfully submitted,

MICHAEL ROSEN

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twentieth day of August, one thousand nine hundred and eighty.

Present:

HONORABLE AMALYA L. KEARSE, *Circuit Judge,*

HONORABLE CALEB R. LAYTON, III, *District* Judge,*

HONORABLE EDWARD DUMBAULD, *District* Judge.**

FILED AUGUST 20, 1980
A. Daniel Fusaro, Clerk

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* Senior District Judge of the United States District Court for the District of Delaware, sitting by designation.

** Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Opinion

80-1088
80-1100

UNITED STATES OF AMERICA,

Appellee,

- v. -

JOHN TARPEY and MALBEN BUCHWALD,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are *affirmed.*

Appellants John Tarpey and Malben Buchwald appeal from judgments of conviction entered after a trial before Judge Edward Neaher in the United States District Court for the Eastern District of New York, for possession of property stolen from a truck in interstate commerce, and conspiracy to receive and possess such property, in violation of 18 U.S.C. §§371 and 659.

On appeal, appellant Tarpey contends that certain evidence introduced against him should have been suppressed because

there was no probable cause for his arrest, because his automobile was entered without his consent, and because a search warrant issued thereafter authorizing the search of the car was procured by means of a false affidavit. Tarpey also argues that the indictment against him should be dismissed because of pre-indictment delay and that his conviction should be reversed because of an erroneous evidentiary ruling at trial. We find no merit in any of these contentions.

As to Tarpey's arrest and search contentions, the evidence included the following. On the day of the arrest, FBI agents had observed one Edward Karnefsky delivering stolen cartons in a green van. After Karnefsky had returned to his loading point and set out again in the same van, the arresting agents followed Karnefsky. They saw Tarpey weave in and out of traffic erratically and at high speed, catch up with Karnefsky's van at a red light, leave his car to speak and gesture to Karnefsky, apparently giving directions. They then saw Karnefsky in his van follow Tarpey's car sedately to a street some 40 blocks away where Tarpey pulled to the curb and Karnefsky pulled up alongside Tarpey's car, and both men left their vehicles. One of the agents approached Karnefsky who voluntarily agreed to show the agent what was in his van, and the agent observed the stolen cartons and crates. From this sequence of events and the presence of the stolen cartons in Karnefsky's van, the agents had reasonable ground to believe that Tarpey was directing the delivery of the cartons or was otherwise connected with their distribution. Thus, probable cause existed for his arrest.

We find no merit in Tarpey's challenge to the legality of the search of his car. Agent Colgan's initial entry into the car, even if made without Tarpey's consent, did not violate his Fourth Amendment rights because Colgan's purpose was to secure the

car, not to search it. *See United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750, 755 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). The warrant later obtained for the search of the car was not rendered invalid by the error in agent Kuhn's affidavit in support of the application for the warrant. The error, which was acknowledged by agent Kuhn who stated that he did not catch it when he read the affidavit prior to signing it, was the statement that invoices were seen on the seat of the car upon agent Colgan's entering the car, whereas in fact they were seen on the floor of the car when they slid into view upon agent Colgan's sudden application of the brakes to avoid traffic. This discrepancy was not material to the existence of probable cause for the warrant to issue.

We also reject Tarpey's speedy trial claims. Violation of the interim timetables contained in the Eastern District Plan for Prompt Disposition of Criminal Cases does not require dismissal of the indictment. *United States v. New Buffalo Amusement Co.*, 600 F.2d 368, 376 (2d Cir. 1979). Nor did Tarpey show any constitutional violation since he made no showing that the delay was for other than good faith investigative purposes, *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Watson*, 599 F.2d 1149, 1153 (2d Cir. 1979), and did not even argue to the district court his present contention that delay was prejudicial to him, because Karnefsky, a possible witness in his favor, disappeared during the period of delay.

Finally, we reject Tarpey's contention that the district court erred at trial in ruling that Tarpey's counsel could not elicit from agent Mika on cross-examination a statement Tarpey had made to him concerning Tarpey's relationship with Karnefsky. The district court did not err in excluding the statement on hearsay

grounds, since the statement was offered for the truth of its contents, not for any more limited purpose. Fed. R. Evid. 801(d)(2).

Appellant Buchwald's sole contention on appeal is that the evidence against him was insufficient for a conviction. We disagree. The agents testified that they had observed the loading of stolen cartons into a yellow van, followed the van to a store owned by Buchwald, and watched while the cartons were unloaded from the van and carried by Buchwald's stepson and others into the store. When the unloading ceased, and agents entered the store, they observed the stolen cartons, some with their labels still attached, and found Buchwald present; they had not seen Buchwald enter or leave the store during the loading although he told the agents that he had just arrived. This evidence was sufficient to permit the jury to infer that Buchwald was present during the entire unloading, that he knew the packages had been stolen, and that he had agreed to receive them.

The judgments of conviction are affirmed.

s/ Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

s/ Caleb R. Layton, III
CALEB R. LAYTON, III, U.S.D.J.

s/ Edward Dumbauld
EDWARD DUMBAULD, U.S.D.J.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED FEB. 25, 1981
A. Daniel Fusaro, Clerk

80-1088
80-1100

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of February, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN TARPEY, MALBEN BUCHWALD,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, John Tarpey,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Order

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro,
Clerk